

This Opinion is Not a
Precedent of the TTAB

Hearing: November 18, 2021

Mailed: December 3, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re L-Nutra, Inc.

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Serial No. 88757432

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Thomas J. Speiss III of Buchalter P.C. for L-Nutra, Inc.

Jillian R. Cantor, Trademark Examining Attorney, Law Office 117,
Cynthia Tripi, Managing Attorney.

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Before Kuhlke, Adlin, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

L-Nutra, Inc. (“Applicant”) seeks registration on the Principal Register of the proposed standard character mark 5 DAY FASTING DIET for goods ultimately identified as “Nutritionally balanced prepared meals for medical use consisting primarily of grains, nuts and vegetables, sold to the consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a medical questionnaire; nutritional meal replacement drinks, soups and snacks adapted for medical use, sold to the consumer only after a medical consultation with

a doctor or other medical personnel, or upon the completion of a medical questionnaire” in International Class 5.¹

The Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant’s mark is merely descriptive of the goods identified in the application.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. Applicant and the Examining Attorney have filed briefs,² and counsel for Applicant and the Examining Attorney appeared at a video hearing before the panel on November 18, 2021. We affirm the refusal to register.

I. Prosecution History and Record on Appeal³

We briefly summarize below the prosecution history of the applications because it provides useful background for our analysis of the descriptiveness refusal.

Applicant originally sought registration of its proposed mark for goods identified as “Nutritionally balanced prepared meals for medical use consisting primarily of

¹ Application Serial No. 88757432 was filed on January 13, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce in connection with the goods identified in the application.

² Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant’s brief appears at 6 TTABVUE. The Examining Attorney’s brief appears at 9 TTABVUE.

³ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

grains, nuts and vegetables; nutritional meal replacement drinks, soups and snacks adapted for medical use; herbal teas for medical treatments; dietary supplements; food supplements; nutritional supplements; vitamin and mineral supplements; plant-based supplements containing algal oil, vegetable powders, and vitamins and minerals.”⁴ The Examining Attorney initially refused registration on the grounds of likelihood of confusion under Section 2(d) of the Trademark Act and mere descriptiveness under Section 2(e)(1) of the Act, and issued a request for information under Trademark Rule 2.61 (b), 37 C.F.R. Section 2.61(b),⁵ requesting Applicant to respond to the following questions:

- (1) Are the goods used as part of a restricted calorie diet?
- (2) Are the goods used as part of a fasting diet?
- (3) Are the goods advertised to be used as part of a restricted, or fasting, diet?
- (4) Are the goods meant or advertised to be used over a period of time? If so, please specify.
- (5) Are the goods meant or advertised to be used over a period of five days?
- (6) While on applicant’s diet, are users recommended to restrict calories by using the identified goods in lieu of regular food?
- (7) While on applicant’s diet, are users recommended to restrict calories by using the identified goods in addition to regular food?⁶

⁴ January 13, 2020 Application at TSDR 1.

⁵ The Examining Attorney subsequently withdrew the Section 2(d) refusal. April 1, 2021 Denial of Request for Reconsideration at TSDR 1. We will not discuss evidence or arguments directed to that refusal.

⁶ February 5, 2020 Office Action at TSDR 1.

The Examining Attorney made of record dictionary definitions of the words “fast,”⁷ “diet,”⁸ and “day,”⁹ and webpages regarding fasting, intermittent fasting, and fasting diets,¹⁰ and the use of supplements while fasting.¹¹

Applicant responded by offering an amendment to its identification of goods and arguing against the refusals.¹² In response to the Examining Attorney’s information requests, Applicant stated, among other things, that its “goods are intended to be consumed while following the Applicant’s diet plan;”¹³ that its “goods are used by individuals who wish to receive the benefits of a fast without following a strict, ‘no food’ diet;”¹⁴ that its “goods are recommended to be consumed while following the restricted diet, which consists of soups, crackers, olives, nut bars and specially-formulated chocolate tasting bars, as well as specially formulated drinks and herbal teas;”¹⁵ and that its “goods are meant to be used in 5-day increments.”¹⁶ Applicant made of record third-party registrations of various FAST-formative marks on the Principal Register.¹⁷

⁷ *Id.* at TSDR 2-19.

⁸ *Id.* at TSDR 91-105.

⁹ *Id.* at TSDR 106-07.

¹⁰ *Id.* at TSDR 20-55, 66-90, 108-29.

¹¹ *Id.* at TSDR 56-65.

¹² August 5, 2020 Response to Office Action at TSDR 2-20.

¹³ *Id.* at TSDR 18.

¹⁴ *Id.* at TSDR 19-20.

¹⁵ *Id.* at TSDR 20.

¹⁶ *Id.*

¹⁷ *Id.* at TSDR 24-47.

The Examining Attorney then made the descriptiveness and information request refusals final and issued an additional request for information.¹⁸ The Examining Attorney made of record additional webpages regarding fasting diets and intermittent fasting, and the use of supplements in such diets,¹⁹ and a dictionary definition of the word “cleanse.”²⁰

Applicant appealed and requested reconsideration, offering another amendment to its identification of goods in the form of the ultimate identification.²¹ Applicant incorporated its previous responses to the Examining Attorney’s information requests into Applicant’s responses to her additional requests.²² The Examining Attorney denied Applicant’s Request for Reconsideration, maintaining the descriptiveness and information request refusals.²³

II. Analysis of Refusal

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them,” unless the mark has acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f).²⁴

¹⁸ September 8, 2020 Final Office Action at TSDR 1.

¹⁹ *Id.* at TSDR 2-76, 115-28.

²⁰ *Id.* at TSDR 77-88.

²¹ March 8, 2021 Request for Reconsideration at TSDR 3.

²² *Id.* at TSDR 8.

²³ April 1, 2021 Denial of Request for Reconsideration at TSDR 1. The Examining Attorney states in her brief that “Applicant’s appeal brief provided acceptable answers to the request for information,” and that “this requirement has been satisfied.” 9 TTABVUE 3 n.1.

²⁴ Applicant does not claim that its proposed mark has acquired distinctiveness.

“A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services.” *In re Fallon*, 2020 USPQ2d 11249, at *7 (TTAB 2020) (quoting *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018) (citing *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978)). “A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *Gyulay*, 3 USPQ2d at 1010). A mark need not describe all of the goods or services in an application to be merely descriptive. “A descriptiveness refusal is proper ‘if the mark is descriptive of any of the [goods] for which registration is sought.’” *Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005)).

“Whether a mark is merely descriptive is ‘evaluated in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use,’” *Fallon*, 2020 USPQ2d 11249, at *7 (quoting *Chamber of Commerce*, 102 USPQ2d at 1219) (internal quotation omitted)),

and “not in the abstract or on the basis of guesswork.” *Id.* (quoting *Fat Boys*, 118 USPQ2d at 1513) (citing *Abcor Dev.*, 200 USPQ at 218)). “We ask ‘whether someone who knows what the goods and services are will understand the mark to convey information about them.’” *Id.* (quoting *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive, and not merely descriptive, if it requires imagination, thought, and perception on the part of someone who knows what the goods or services are to reach a conclusion about their nature from the mark. *Id.* (citing *Fat Boys*, 118 USPQ2d at 1515).

“We must ‘consider the *commercial impression* of a mark as a whole.” *Id.* (quoting *Real Foods*, 128 USPQ2d at 1374). “In considering [the] mark as a whole, [we] ‘may not dissect the mark into isolated elements,’ without consider[ing] . . . the entire mark,” *id.* (quoting *Real Foods*, 128 USPQ2d at 1374) (internal quotation omitted), “but we ‘may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.’” *Id.* (quoting *Real Foods*, 128 USPQ2d at 1374) (internal quotation omitted)). “Indeed, we are ‘required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.’” *Id.* (quoting *DuoProSS*, 103 USPQ2d at 1758). Here, Applicant’s proposed mark consists of the words 5,²⁵ DAY, FASTING, and DIET.

²⁵ “The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed form or regular fixed editions.” *In re OEP Enters., Inc.*, 2019 USPQ2d

“If the words in the proposed mark are individually descriptive of the identified goods, we must determine whether their combination ‘conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.’” *Id.* (quoting *Fat Boys*, 118 USPQ2d at 1515-16) (internal quotation omitted)). “If each word instead ‘retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive.’” *Id.* (quoting *Fat Boys*, 118 USPQ2d at 1516) (internal quotation omitted)).

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.” *Id.* (quoting *Real Foods*, 128 USPQ2d at 1374). “These sources may include [w]ebsites, publications and use in labels, packages, or in advertising materials directed to the goods [or services].” *Id.*, at *7-8 (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) (internal quotation omitted)).

“It is the Examining Attorney’s burden to show, prima facie, that a mark is merely descriptive of an applicant’s goods or services.” *Id.*, at *8 (quoting *Fat Boys*, 118 USPQ2d at 1513). “If such a showing is made, the burden of rebuttal shifts to the applicant.” *Id.* (quoting *Fat Boys*, 118 USPQ2d at 1513). “The Board resolves doubts

309323, at *7 n.29 (TTAB 2019). We take judicial notice that cardinal numbers such as the number 5 at the beginning of Applicant’s proposed mark are described interchangeably by name (five), Arabic numeral (5), or Roman numeral (V). MERRIAM-WEBSTER DICTIONARY ([merriam-webster.com/dictionary/number](https://www.merriam-webster.com/dictionary/number) (Table of Numbers)), last accessed on December 2, 2021).

as to the mere descriptiveness of a mark in favor of the applicant.” *Id.* (quoting *Fat Boys*, 118 USPQ2d at 1513).

We begin by examining the individual components of Applicant’s proposed mark. As Applicant acknowledges, the Examining Attorney made of record dictionary “definitions for the terms ‘DAY,’ ‘FASTING,’ and ‘DIET,’” 6 TTABVUE 8, which define the respective words as follows:

- “Day” means “[a] period of twenty-four hours as a unit of time, reckoned from one midnight to the next, corresponding to a rotation of the earth on its axis;”²⁶
- “Fast,” in its verb form, means “to eat sparingly or abstain from some foods;”²⁷
- “Diet” means “[a] special course of food to which one restricts oneself, either to lose weight or for medical reasons.”²⁸

In its brief, Applicant admits that the phrase 5 DAY describes a feature of the goods identified in the application because they “are meant to be used in 5-day increments,” 6 TTABVUE 21,²⁹ and that the word DIET describes a function, purpose, or use of the goods because its “goods are recommended to be consumed while following the restricted diet, which consists of soups, crackers, olives, nut bars and

²⁶ February 5, 2020 Office Action at TSDR 106 (lexico.com/en/definition/day).

²⁷ *Id.* at TSDR 5 (merriam-webster.com/dictionary/fast).

²⁸ *Id.* at TSDR 91-92 (lexico.com/en/definition/diet).

²⁹ Applicant made a similar admission during prosecution. August 5, 2020 Response to Office Action at TSDR 20.

specially-formulated chocolate tasting bars, as well as specially formulated drinks and herbal teas.” *Id.* at 20.³⁰ Applicant claims only that the word FASTING, the gerund form of the verb “fast,” does not immediately describe a feature, function, purpose, or use of the goods.

Applicant rejects the dictionary definition of “fast” relied on by the Examining Attorney (“to eat sparingly or abstain from some foods”). According to Applicant, that definition is only the Examining Attorney’s “own perceived idea of the definition of the Mark, rather than a true definition” because her “dictionary evidence demonstrated that the term ‘FAST’ has 37 different meanings.” *Id.* at 8-9 (emphasis supplied by Applicant).

Applicant argues that

[t]his long list of various and distinct definitions clearly demonstrates that the term “FAST” has numerous meanings and therefore cannot *immediately* convey any one specific definition; and therefore, cannot immediately convey the Examining Attorney’s proposed definition. By definition, it is impossible for a term having multiple definitions to convey *one* specific idea or meaning. While some consumers may interpret the word “fast” to be referring to “fasting,” this interpretation requires the consumer to use thought, perception, and imagination to reach this conclusion. On the other hand, many consumers will not come to the same conclusion and may interpret the word “fast” to mean any of the numerous definitions associated with the term. For example, when considering the 37 possible definitions provided by the Examining Attorney, a consumer could interpret “FASTING” to mean “stable” or “in quick succession”. These are reasonable definitions that could be applied to the Applicant’s Mark. With this in mind, it is clear that potential consumers will

³⁰ Applicant made the same admission during prosecution. August 5, 2020 Response to Office Action at TSDR 20.

not come to an immediate conclusion either as to the meaning of the Mark or the goods Applicant is actually providing. Rather, consumers will need to take a mental pause and use thought, perception, and imagination in order to come to a conclusion as to the Applicant's goods. Such actions are the exact definition of a suggestive mark. . . . The Examining Attorney was also required to take a mental pause and use thought and perception to reach the conclusion as to the nature of the Applicant's goods in order to opine that the Applicant's Mark is merely descriptive. Applicant respectfully submits that the fact that the Examining Attorney had to creatively combine various meanings of different words to create a potential definition for the Mark proves that the Mark cannot *immediately* convey anything about the Applicant's goods. A word or phrase that has more than one definition is incapable of immediately conveying a specific definition because it has multiple meanings. Thus, the Mark cannot be merely descriptive, and is at most suggestive of the Applicant's goods.

Id. at 9-10 (emphasis supplied by Applicant).

Applicant further argues that

the term "FASTING" is not merely descriptive, but rather is suggestive of the goods. The Mark is at most suggestive because the Mark does not provide any information regarding the Applicant's goods. In fact, a potential consumer will not be able to immediately understand the goods to be nutritionally prepared meals for use only after a medical consultation with a doctor or other medical personnel or upon the completion of a medical questionnaire, simply by viewing the Mark. While a potential consumer may guess that the goods may relate to a diet plan, a consumer is more likely to believe that the goods are related to providing information regarding a type of diet plan rather than actually providing nutritionally prepared meals. Furthermore, nothing about the Mark suggests or even conveys to a consumer that the goods are only available *after* a medical consultation with a doctor or other medical personnel or upon the completion of a medical questionnaire. Thus, the consumer is left wondering what the Applicant's goods actually are. The Examining Attorney's own proposed definition of the Mark,

along with the multiple meanings of the term “FAST,” supports the finding that the Mark is at most suggestive of the Applicant’s goods.

Id. at 11-12 (emphasis supplied by Applicant).

As explained below, these arguments reflect an all-too-common and fundamental misunderstanding of the test for mere descriptiveness, but they are particularly troubling here because Applicant’s counsel is not writing them on a clean slate. The Board has previously rejected virtually the same arguments regarding the meaning of the word “fasting” in the context of similar goods in two unsuccessful appeals by Applicant of descriptiveness refusals to register the proposed marks 1 DAY FASTING DIET, *In re L-Nutra, Inc.*, Serial No. 88324967 (TTAB Jan. 20, 2021),³¹ and FASTING BAR. *In re L-Nutra, Inc.*, Serial No. 88171365 (TTAB May 19, 2021).³² Both of these decisions issued before Applicant filed its brief in this case, but Applicant’s counsel nevertheless persisted in repeating essentially the same unsuccessful arguments here. Although each case must be decided on its own facts, and the two prior non-precedential decisions do not bind us on this appeal, we view those decisions as useful

³¹ The goods identified in the application to register the 1 DAY FASTING DIET mark were “Nutritionally balanced prepared meals for medical use consisting primarily of grains, nuts and vegetables; nutritional meal replacement drinks, soups and snacks adapted for medical use; herbal teas for medical treatments; dietary supplements; food supplements; nutritional supplements; vitamin and mineral supplements; plant-based supplements containing algal oil, vegetable powders, and vitamins and minerals, all sold only through healthcare professionals or upon consultation with healthcare professionals.” When asked at the oral hearing to explain why the Board’s analysis in that case should not apply to the very similar proposed mark 5 DAY FASTING DIET, Applicant’s counsel responded only that he disagreed with the Board’s prior decision. Applicant did not appeal that decision, however, and the application became abandoned.

³² The goods identified in the application to register FASTING BAR mark were “Nutritionally balanced prepared meals for medical use consisting primarily of grains, nuts and vegetables; nutritional meal replacement snacks adapted for medical use.”

in this closely analogous case, particularly on the issue of whether the word FASTING is descriptive of the highly similar goods identified in the current application.

As the Board explained in both prior decisions, the fact that the word “fast” “may have other meanings in different contexts is not controlling.” *Canine Caviar*, 126 USPQ2d at 1598. “[I]t is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018). We must consider the meaning of the word FASTING, the gerund form of the verb “fast,” in the context of the goods identified in the application, and not, as Applicant has now argued three times, in the abstract. *Id.*

The definition of “fast” as “to eat sparingly or abstain from certain foods” applies in relation to the goods identified in the application. The record is replete with evidence of third-party and media use of the gerund “fasting” in connection with “intermittent fasting diets” and “fasting diets” in which consumers “eat sparingly” for a specified period of time and “abstain from some foods.”³³ Applicant’s 5 DAY FASTING DIET is similarly described as a “fasting mimicking diet” on two websites.³⁴ As in the case involving Applicant’s proposed mark 1 DAY FASTING DIET, there is no evidence in the record here to support a finding that when

³³ February 5, 2020 Office Action at TSDR 23-42, 66-90, 108-29; September 8, 2020 Office Action at TSDR 2-76.

³⁴ February 5, 2020 Office Action at TSDR 109-10, 113-14. As noted above, Applicant stated during prosecution that its goods are intended to be consumed while following its diet plan, and at the oral hearing, Applicant’s counsel acknowledged that its goods are used in a “fasting diet.”

encountered in connection with the goods identified in the current application, “the term ‘FASTING’ in the mark will be perceived as meaning anything but the full or partial abstention of foods.” 15 TTABVUE 5 (Serial No. 88324967). As in the case involving Applicant’s proposed mark FASTING BAR, the word FASTING in Applicant’s proposed mark 5 DAY FASTING DIET describes a feature or attribute of the goods identified in the application, “namely, that they are . . . to be consumed . . . while ‘eat[ing] sparingly or abstain[ing] from certain foods.’” 26 TTABVUE 22 (Serial No. 88171365). The word FASTING, like each of the other words in Applicant’s proposed mark, is descriptive of the identified goods.

We turn now to the issue of whether Applicant’s mark as a whole is anything more than merely the sum of its descriptive parts, specifically, “whether the combination of the component words of Applicant’s mark ‘conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.’” *Fat Boys*, 118 USPQ2d at 1515-16 (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Applicant argues that the answer is “yes” because a consumer encountering the 5 DAY FASTING DIET mark “will not come to an immediate conclusion either as to the meaning of the Mark or the goods Applicant is actually providing,” 6 TTABVUE 10, “will not be able to immediately understand the goods to be nutritionally prepared meals for use only after a medical consultation with a doctor or other medical personnel or upon the completion of a medical questionnaire,” *id.* at 11-12, and will be “left wondering what the Applicant’s goods actually are.” *Id.* at 12. Based on these arguments, Applicant concludes that “the

Mark requires consumers to use their imagination, thought, or perception to attempt to determine the Applicant's goods" and that "the Mark is at most suggestive, and cannot – and does not – merely describe the Applicant's goods." *Id.* at 13.

All of these arguments address the wrong inquiry. As the Board and the Federal Circuit have repeatedly explained, the "question is not whether someone presented only with the mark could guess the goods and services listed in the identification. Rather, the question is whether someone who knows what the goods and services are will understand the mark to convey information about them." *Fallon*, 2020 USPQ2d 11249, at *11 (quoting *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953 (TTAB 2018) (citing *DuoProSS*, 103 USPQ2d at 1757)). *Cf. Mueller Sports Med.*, 126 USPQ2d at 1590 (rejecting the argument that the proposed mark RECOIL was not merely descriptive of medical and athletic cohesive tape because RECOIL did not have one meaning, and consumers needed to use a multi-stage reasoning process to associate RECOIL with medical or athletic cohesive tape) (citing *DuoProSS*, 103 USPQ2d at 1757)). A consumer who knows that the goods are "Nutritionally balanced prepared meals for medical use consisting primarily of grains, nuts and vegetables, sold to the consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a medical questionnaire," and "nutritional meal replacement drinks, soups and snacks adapted for medical use, sold to the consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a medical questionnaire," will understand the proposed mark 5 DAY FASTING DIET to convey immediately the purpose of the goods, namely (as Applicant puts it), that they are "specially prepared meals for individuals to consume

during a specific time period,” 6 TTABVUE 12, “while following [Applicant’s] restricted diet.” *Id.* at 20.³⁵

Applicant also argues that the Examining Attorney’s evidence regarding the use of the elements of Applicant’s mark is insufficient to show descriptiveness because, as Applicant claims ad nauseam, each of the articles in the record “does not use the Mark in a descriptive fashion in connection with the Applicant’s goods.” *Id.* at 16-19. According to Applicant, unless such a use is shown, each “article is not relevant to show descriptiveness of the Mark.” *Id.*

In the case involving Applicant’s proposed mark FASTING BAR, the Board rejected the identical argument that “[a]ll of the Examining Attorney’s internet evidence fails to show [sic] descriptive usage of the Mark in connection with the Applicant’s goods,” 26 TTABVUE 22 (Serial No. 88171365) (internal citation omitted), which the Board characterized as an argument “that if the record does not show descriptive use of its proposed mark FASTING BAR per se, the mark cannot ipso facto be descriptive.” *Id.* at 23. As the Board bluntly put it, “[t]hat is not the law.” *Id.* “There is no requirement that the Examining Attorney prove that others have used the mark at issue or that they need

³⁵ Applicant makes much of the fact that the identified goods “are only available to consumers **after** they have undergone a consultation with a doctor or other medical personnel, or **after** completion of a medical questionnaire” and “are not available to the general consuming public but rather are only available to certain consumers in connection with medical guidance.” 6 TTABVUE 7 (emphasis supplied by Applicant). Applicant claims that “[t]hese distinctions are important to remember when considering the descriptiveness of the Applicant’s goods” [sic], *id.*, because “nothing about the Mark suggests or even conveys to a consumer that the goods are only available **after** a medical consultation with a doctor or other medical personnel or upon the completion of a medical questionnaire.” *Id.* at 12 (emphasis supplied by Applicant). As discussed above, however, the correct test for descriptiveness **assumes** that consumers know that the goods “are only available **after** a medical consultation with a doctor or other medical personnel or upon the completion of a medical questionnaire.” *Id.*

to use it, although such proof would be highly relevant to an analysis under Section 2(e)(1).” *Fallon*, 2020 USPQ2d 11249, at *11 (quoting *Fat Boys*, 118 USPQ2d at 1514). The “fact that Applicant may be the first or only user of a term does not render that term distinctive, if it otherwise meets the standard’ for descriptiveness.” *Id.* (quoting *Fat Boys*, 118 USPQ2d at 1514). The articles in the record here support a finding that 5 DAY FASTING DIET meets that standard.

Applicant also claims that the existence of third-party registrations of FAST-formative marks support registration of 5 DAY FASTING DIET. 6 TTABVUE 13-15. Applicant cites Principal Register registrations of FAST LYTE, BRAIN FAST, VITAFAST, ENDURELITE FUELING FAST and design, FASTBLAST, PROBIOTIC FASTMELT, FASTCHEWS, FAST TRACK SNACK, FAST TRACK NUTRITION, FAST STIX, FAST PACK, MIGHTY FAST, and FASTING STUDIO for various goods in Class 5,³⁶ and argues that if these “marks were allowed to register on the Principal Register, Applicant’s mark should be afforded the same treatment.” *Id.* This argument was not made in the cases involving Applicant’s proposed marks 1 DAY FASTING DIET and FASTING BAR, but it too is meritless.

³⁶ Applicant attached USPTO electronic records regarding these registrations to its appeal brief. 6 TTABVUE 23-46. The Board strongly discourages this practice. “Parties to Board cases occasionally seem to be under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or convenience to the Board. It is neither.” *In re Michalko*, 110 USPQ2 1949, 1950 (TTAB 2014). As the Board explained in *Michalko*, “[w]hen considering a case for final disposition, the entire record is available to the panel,” and “[b]ecause we must determine whether attachments to briefs are properly of record, citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during the prosecution of the application,” which requires “more time and effort than would have been necessary if citations directly to the prosecution history were provided.” *Id.* at 1950-51.

According to Applicant, the “third party registrations demonstrate that a mark containing the word ‘FAST’ and variants thereof are [sic] capable of acting as an indicator of source,” that “language similar to Applicant’s Mark for anything food and nutritionally related does not automatically render a mark ‘merely descriptive,’” and that “[t]hese registration records indicate that other Examining Attorneys have found such marks to be registrable.” *Id.* at 16. These arguments may be true as far as they go, but they do not support registration of Applicant’s proposed mark 5 DAY FASTING DIET. “The question of whether a proposed mark is merely descriptive or generic is determined based on the evidence of record at the time each registration is sought.” *In re The Consumer Protection Firm PLLC*, 2021 USPQ2d 238, at *22 (TTAB 2021) (citing *In re The Dot Commc’ns Network LLC*, 101 USPQ2d 1062, 1064 (TTAB 2011)). “Each case must be decided on its own facts, and the Board is not bound by prior decisions involving different records.” *Id.* “[T]he fact that third-party registrations exist for marks allegedly similar to Applicant’s [proposed mark] is not conclusive on the issue of descriptiveness or genericness.” *Id.* (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)). The record supports a finding that 5 DAY FASTING DIET is merely descriptive of the goods identified in the application, and “[m]arks that are merely descriptive or generic do not become registrable simply because other seemingly similar marks appear on the register.” *Id.*

Applicant’s argument of last resort is that

[b]ecause the line between merely descriptive and suggestive marks is “so nebulous,” the Board takes the position that doubt is resolved in favor of the Application on the assumption that competitors have the opportunity to oppose registration once published and to present

evidence that is usually not present in an *ex parte* examination.

6 TTABVUE 19 (citations omitted). Applicant is correct that “the Board resolves doubts as to the mere descriptiveness of a mark in favor of the applicant,” *Fallon*, 2020 USPQ2d 11249, at *8 (quoting *Fat Boys*, 118 USPQ2d at 1513), but we have no doubts here that, as in the case involving Applicant’s proposed mark 1 DAY FASTING DIET, “when considered as a whole, [5] DAY FASTING DIET is no less descriptive as applied to the goods than its individual terms,” and that “the term [5] DAY FASTING DIET conveys an immediate idea of the purpose of Applicant’s goods in supplying a diet which features [five] day fasting.” 15 TTABVUE 10 (Serial No. 88324967).

We find, on the basis of the record as a whole, that the Examining Attorney established a prima facie case that Applicant’s proposed mark 5 DAY FASTING DIET is merely descriptive of the goods identified in the application, and that Applicant failed to rebut that showing. Accordingly, Applicant’s proposed mark is ineligible for registration on the Principal Register in the absence of a showing of acquired distinctiveness under Section 2(f) of the Trademark Act.

Decision: The refusal to register is affirmed.